



WEB COPY



Arb.O.P (Com.Div.) No. 25 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2022

CORAM

THE HON'BLE MR. JUSTICE M.SUNDAR

Arb.O.P (Com.Div.) No. 25 of 2022

Asian Wind Energy Private Limited,
SF No.746/1 & 2, 751/1 & 2
Manmangalam Village, Semmadai,
Karur, Tamil Nadu 639 006
Represented by its Managing Director.

... Petitioner

Vs.

Santha Spinning Mills Ltd.
119 Car Street,
Somanur, Coimbatore,
Tamil Nadu 641 668

Also at:
Kadayur Post,
Kangayam,
Tirupur Dt.,
Tamil Nadu 638 701.

... Respondent

Arbitration Original Petition filed under Section 11(6) of the
Arbitration and Conciliation Act, 1996 to appoint an arbitrator on behalf of
the respondent in terms of clause 13 of the Power Purchase Agreement



Arb.O.P (Com.Div.) No. 25 of 2022

dated 24.09.2012 to adjudicate upon the disputes that have arisen between the parties in relation to the said agreement.

For Petitioner : Ms.T.K.Vaishnavvi
for Mr.R.Parthasarathy

For Respondents: Mr.Adithya Reddy

ORDER

This order will dispose of captioned 'Arbitration Original Petition' ['Arb.OP' for the sake of brevity, convenience and clarity], which has been presented in this Court under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of brevity] with a prayer for appointment of an Arbitrator.

2. In the captioned Arb.OP, Hon'ble predecessor Judge issued notice on 31.01.2022, lone respondent has been duly served, lone respondent has entered appearance through a counsel and Mr.Adithya Reddy, learned counsel for the lone respondent is before this Court.



3. Ms.T.K.Vaishnavvi, learned counsel representing the counsel on record for petitioner submits that captioned Arb.OP is predicated on an agreement dated 24.09.2012 captioned 'POWER PURCHASE AGREEMENT' [hereinafter 'PPA' or 'primary contract' for the sake of convenience and clarity] and more particularly Clause 13 thereat. To be noted, Clause 13 of the primary contract is captioned 'DISPUTE RESOLUTION' and the same reads as follows:

'13. DISPUTE RESOLUTION

13.1 The parties shall endeavour to settle any dispute arising in connection with the interpretation, performance, termination of this PPA, or otherwise in connection with this PPA through friendly consultations and negotiations.

13.2 If no settlement can be reached through consultations of the senior corporate management of the parties within (30) days of the dispute, either party may, be delivering a notice of the Dispute to the other party, refer such matter to be settled by arbitration.

13.3 The dispute shall be settled under the Arbitration and Conciliation Act, 1996 by Three Arbitrators appointed in accordance with clause 13.4(c) below.

13.4 The parties agree with respect to such arbitration that:

(a) The Arbitration proceedings shall be conducted in English.

(b) The place of arbitration shall be Karur.



(c) There shall be three Arbitrators, all of whom shall be fluent in English. One arbitrator shall be appointed by the Power Producer, one arbitrator by the User Member, and the third shall be appointed by these two Arbitrators and shall serve as the chairman of the arbitral tribunal.

(d) The Arbitration award shall be final and binding on the parties, and enforceable in accordance with its terms. The Arbitrators shall state reasons for their findings. The parties agree to be bound thereby and to act accordingly.

(e) The costs of Arbitration shall be borne as determined in the arbitration award. If the party is required to enforce an arbitral award by legal action of any kind, the other party against whom such legal action is taken shall pay all reasonable costs and expenses and attorneys fees, including any cost of additional litigation or arbitration taken by such party seeking to enforce the award.

(f) When any dispute occurs which is submitted to arbitration, except for the matter under dispute, the parties shall continue to exercise their remaining respective rights and fulfil their remaining obligations under this PPA.'

4. Learned counsel for petitioner submits that the primary contract was operated, disputes erupted regarding alleged non-payment towards power units that have been supplied by the petitioner to the respondent. Elaborating on this, learned counsel submits that the claim of the petitioner is towards power units that were supplied to the respondent which were not



consumed/utilized but banked by the respondent. Respondent did not honour the invoices for such power units and the claim is over Rs.76.21 lakhs is learned counsel's say. Captioned Arb.OP being one under Section 11, this Court refrains itself from expressing any opinion or view on the merits of the claim. Suffice to say that the petitioner invoked the aforementioned agreement by sending a communication dated 27.01.2021 to the respondent and the respondent sent a reply dated 22.03.2021 *inter alia* disputing the liability and contending that there is no arbitrable disputes as according to the respondent there is no liability. On this again, this Court refrains itself from expressing any opinion or view on the merits of the matter as captioned Arb.OP is one under Section 11 of A and C Act.

5. Be that as it may, the following points are to be noted:

a) There is no disputation, disagreement or contestation between the petitioner's and respondent's counsel regarding the existence of the aforementioned arbitration agreement;

b) Disputations and contestations are only with regard to the name of the petitioner and denial/resistance of the same by the respondent;



WEB COPY

c) The arbitration agreement mentions 'Karur' as the seat [vide clause 13.4(b)] {to be noted, entire Clause 13 of PPA/primary contract has been extracted and reproduced supra}. Notwithstanding this, both learned counsel, on instructions from their respective clients/litigants submit in one voice in unison that the 'seat' can now be 'Chennai'. They also go on to submit that the 'seat' and 'venue' shall now be Chennai. This submission is recorded.

d) The arbitration agreement vide Clause 13.4(c) talks about arbitration by a three member 'Arbitral Tribunal' ['AT'] but both counsel, on instructions from their respective clients/litigants, further submit that AT may please be downsized and a sole Arbitrator may please be appointed.

6. A careful perusal of the trigger notice dated 27.01.2021 from the petitioner invoking the arbitration agreement (alluded to supra) brings to light that the petitioner has suggested the name of a Hon'ble former Judge of this Court as sole Arbitrator for the three member AT nominee of the



petitioner. Therefore, the request before this Court now is that it would be desirable to have another former Hon'ble Judge of this Court to be appointed as sole Arbitrator. This is more so as both sides agreed for downsizing and this is solely as a matter of good order.

7. Before writing the operative portion of this order, this Court deems it appropriate to remind itself that a legal drill under Section 11 of A and C Act is circumscribed by sub-section (6A) thereat. In other words, a legal drill under Section 11 should perambulate within the statutory perimeter sketched by sub-section (6A) of Section 11 of A and C Act. This aspect of the matter came up for consideration before Hon'ble Supreme Court in oft-quoted ***Mayavati Trading*** case law i.e., ***Mayavati Trading Private Limited Vs. Pradyut Deb Burman*** reported in ***(2019) 8 SCC 714***], relevant paragraph in ***Mayavati Trading*** case law is paragraph No.10 and the same reads as follows:

'10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in



the aforesaid judgments, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera SA.

(underlining made by this Court to supply emphasis and highlight)

8. Aforementioned paragraph 10 of **Mayavati Trading** case law takes this Court to **Duro Felguera, S.A** case law i.e., **Duro Felguera, S.A. Vs. Gangavaram Port Limited** reported in **(2017) 9 SCC 729]**, relevant paragraphs in **Duro Felguera** case law are paragraphs 47, 59 and the same read as follows:

'47. What is the effects of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as 'the 2015 Amendment') with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.'

*'59. The scope of the power under **Section 11** (6) of the 1996 Act was considerably wide in view of the decisions in **SBP and Co.** (supra) and **Boghara Polyfab** (supra). This position continued till the amendment brought about in 2015. After the amendment, all*



WEB COPY



Arb.O.P (Com.Div.) No. 25 of 2022

that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in [Section 11](#) (6A) ought to be respected. '

9. In the light of the narrative thus far, this Court appoints Hon'ble Mr.Justice V.Parthiban (Retd.), a former Hon'ble Judge of this Court, residing at No.5069, Z Block, 12th Street, Anna Nagar (West), Chennai – 600 040 [Ph: 26280804, 26214850, Mob: 9444094401] as sole Arbitrator. Hon'ble sole Arbitrator is requested to hold sittings in the 'Madras High Court Arbitration and Conciliation Centre under the aegis of this Court' (MHCAC), enter upon reference, adjudicate the question as to whether arbitrable disputes arise/subsist at all qua primary contract (PPA), if yes adjudicate upon the same and ultimately render an award as per Madras High Court Arbitration Proceedings Rules 2017 and fee of the Hon'ble Arbitrator shall be as per Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees) Rules 2017.



Arb.O.P (Com.Div.) No. 25 of 2022

10. Captioned Arb.OP disposed of in the aforesaid manner. There shall be no order as to costs.

27.04.2022

Speaking/Non-speaking order
Index : Yes / No
gpa/nsa

Note: The Registry is directed to communicate this order forthwith to

1. Hon'ble Mr.Justice V.Parthiban (Retd.,)
No.5069, Z Block, 12th Street,
Anna Nagar (West),
Chennai – 600 040
Ph: 26280804, 26214850, Mob: 9444094401

2.The Director
Tamil Nadu Mediation and conciliation Centre
-cum-
Ex Officio Member,
Madras High Court Arbitration Centre
Madras High Court, Chennai – 600 104.



WEB COPY



Arb.O.P (Com.Div.) No. 25 of 2022

M.SUNDAR.J.,
gpa

Arb.O.P (Com.Div.) No. 25 of 2022

27.04.2022